



Tuesday, October 20
11:00 am–12:30 pm

1106 Avoiding Ambiguity (and Litigation) in Contract Drafting: Lessons from a Litigator

Blake T. Bilstad

Senior Vice President, General Counsel and Secretary
Provide Commerce, Inc.

Carrie Gleeson

General Counsel
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Nancy L. Stagg

Principal
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Alan K. Tse

General Counsel
LG Electronics MobileComm USA

Faculty Biographies

Blake T. Bilstad

Blake Bilstad is the senior vice president, general counsel and secretary of Provide Commerce, Inc., an e-commerce group that specializes in the delivery of perishables and other gifts direct from suppliers to consumers through its brands ProFlowers®, RedEnvelope®, Cherry Moon Farms®, Secret Spoon® and Shari's Berries. His responsibilities include managing all legal matters for the group including commercial contracts, M&A, IP, privacy/Internet law, corporate governance, securities, governmental compliance, litigation and insurance. He played a key role in Provide Commerce's acquisition by Liberty Media in 2006, and the company's acquisition of RedEnvelope.

Previously, Mr. Bilstad worked for MP3.com, Inc., a pioneering online music company, and its eventual acquirer Vivendi Universal, consolidating US Internet companies to form VUNet USA and serving most recently as the group's senior vice president-legal affairs and secretary. Prior to that Mr. Bilstad was a business associate at the law firm of Cooley Godward LLP.

Mr. Bilstad has served in appointed leadership positions with non-profits such as the MP3.com Foundation and San Diego Social Venture Partners, and is currently on the advisory board for Blissport.com, a travel planning start-up.

Mr. Bilstad holds a JD, cum laude, from Harvard Law School, where he was the executive editor of the Harvard Journal of Law & Technology and winner of the Irving Oberlin Memorial Award writing prize, and holds a BA, magna cum laude, from Duke University.

Carrie Gleeson

As divisional general counsel for American Water – Western Division in California, Carrie Gleeson leads a team of professionals dedicated to providing quality legal advice and counsel on matters affecting American Water's Western States. She serves as general counsel and secretary to Arizona American Water, California American Water, Hawaii American Water, and New Mexico American Water.

Ms. Gleeson began practice as a business litigator with a private firm. Later, she joined the San Diego City Attorney's Office, practicing in several areas including leases, land use, parks, labor and employment, and redevelopment. She left the city as chief deputy city attorney to join American Water.

Ms. Gleeson earned her BA from Saint Mary's College of California. She earned her law degree from the University of California, Hastings College of Law, where she was a founding board member of the Women's Law Journal, and an associate editor of the Communications and Entertainment Law Journal.

Nancy L. Stagg

Nancy L. Stagg is a principal in the San Diego office of Fish & Richardson PC. Her practice encompasses a wide variety of business and intellectual property litigation, including trade secret and licensing disputes, as well as the defense of consumer class actions. Ms. Stagg has significant trial and appellate experience, as well as experience in mediation and litigation-avoidance strategies.

Ms. Stagg is the national chair of Fish & Richardson's Diversity Initiative. She is a master of the William B. Enright chapter of the American Inns of Court. She is a director of the San Diego County Bar Foundation, and serves on the board of governors of the San Diego chapter of the Association of Business Trial Lawyers.

Ms. Stagg received a BA from Franklin & Marshall College and is a cum laude graduate of California Western School of Law.

Alan K. Tse

Alan K. Tse is general counsel of LG Electronics MobileComm USA, Inc., the nation's second largest mobile phone manufacturer. He is responsible for all legal matters for LG's mobile phone business in North America and sits on the company's senior management committee.

Prior to joining LG, Mr. Tse was the vice president and general counsel of Ligos Corporation, a venture capital backed software company based in Silicon Valley. Prior to Ligos, Mr. Tse was the vice president of strategic development and general counsel of Centerpoint Broadband Technologies, Inc., a Silicon Valley telecommunication equipment company. Mr. Tse started his career as a business and technology attorney at Brobeck Phleger and Harrison LLP in their Silicon Valley office representing technology companies and venture capitalists.

Mr. Tse is the co-founder and serves on the board of the Asian American Legal Foundation and also serves on the board of directors of ACC's San Diego chapter. Mr. Tse is a frequent speaker at national legal conferences on the roles and responsibilities of the general counsel and was named one of the best lawyers under 40 by the National Asian Pacific American Bar Association in 2005.

Mr. Tse holds a BA from the University of California at Berkeley where he earned Phi Beta Kappa honors and graduated cum laude from Harvard Law School.

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Avoiding Ambiguity (and Litigation) in Contract Drafting: Lessons from a Litigator

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Ambiguous and imprecise drafting can lead to litigation

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Today we'll discuss:

- Vague or undefined terms**
- Failing to define scope of work & deliverables**
- Failing to address IP ownership**
- Inconsistencies**
- Lack of clarity re: breach, cure, default & notice**
- Unenforceable provisions**
- Faulty jurisdiction**

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Vague or undefined payment terms:

“Company will pay Sale Representative monthly 25% of collections attributable to Sales Representative.”

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What do the parties mean by “collections attributable?”

When are collections earned?

Can Company offset for refunds issued?

What happens after Sales Rep leaves Company's employment?

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A more precise agreement might have helped

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Company shall pay Sale Representative on the 15th of each month a commission equal to 25% of all Net Collections received by Company during the prior calendar month from any Account previously assigned to Sale Representative by Company. "Net Collections" is the sum of all cash receipts received by Company during the prior calendar month for purchases of Company's product, less the amount of any refunds or credits issued to the assigned Accounts in the prior calendar month. Sales Representative shall not earn the commission until the date payment is due to be paid by the Company. If Sales Representative leaves Company's employment for any reason, Sales Representative's right to earn commission terminates on the last day of employment.

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Similar problems arise in:
employment agreements
bonus agreements
licensing agreements
any contract with future payments

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Rule of thumb:
Don't approve an agreement unless Accounting understands how to calculate payments and knows when to make payments

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Failure to Define Deliverables or Scope of Work

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“ Company engages ACME to provide hardware and software engineering services....”

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What does that mean?

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Always include a list of deliverables:
Software Source Code
Bill of Materials
Working prototype

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Define the scope of work to be performed

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Identify how changes to scope of work must be made to be effective

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Is intellectual property at issue?

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Who owns what ? Don't rely on "work for hire"

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Include as deliverables all documents needed to perfect ownership

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Address licensing issues -- are you giving the contractor a license to use the work?

(So he or she can use the work for a competitor?)

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Disavow "side agreements" in advance (and use integration clauses)

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Other drafting problems

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Territory and the Internet

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Inconsistent language (cutting and pasting without critical review)

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Failure to harmonize multiple documents and exhibits

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Failure to harmonize multiple agreements

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Breach, Cure, Termination & Notice Provisions

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Is material breach or default defined?

What cure is sufficient?

When and how to terminate?

What notice is required?

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Anti-waiver provisions are a must!

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Unenforceable Provisions

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Unilateral attorneys' fees provisions

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IpsO facto (insolvency) clauses

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Faulty jurisdiction:

Avoid one-sided forum selection or jurisdiction clauses

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Ambiguous Indemnity Clauses:

Defend, indemnify and hold harmless – what do you want?

Does “defend” = “indemnify” = “hold harmless”?

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Defend = I will protect your rights and [maybe] hire/pay for a lawyer for you in the event of a 3rd party claim

Indemnify = I will [reimburse] you for losses you incur under this Agreement [but when?]

Hold Harmless= I won't sue you

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California Quirks:

Civil Code § 1542

Business & Professions Code § 16600

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Final Thoughts:

Can a stranger understand what the parties intended and who was to do what?

Can your business people understand what to do?

Plain English – if you aren't sure what it means, you're not done

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ACC Extras

Supplemental resources available on www.acc.com

Drafting And Interpreting Contracts.

InfoPak. February 2007

<http://www.acc.com/legalresources/resource.cfm?show=19650>

Best Practices in Contract Negotiation, Drafting, & Administration.

Program Material. December 2007

<http://www.acc.com/legalresources/resource.cfm?show=19945>

A Practical Guide to Good Drafting.

Quick Reference. July 2007

<http://www.acc.com/legalresources/resource.cfm?show=16524>

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.